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Judge: Alston
Chapter: 7
Location: Telephonic
Hearing Date: December 3, 2020
Hearing Time: 11:00 AM
Response Date: November 30, 2020

5 Attorneys for Defendant 21st Mortgage Corporation

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9 IN THE UNITED STATES BANKRUPTCY COURT
10 FOR THE WESTERN DISTRICT OF WASHINGTON

11 In re

Case No. 09-15167

12 Jack Carlton Cramer, Jr,

Adv. Proc. No. 20-01047-CMA

13 Debtor,

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SECOND SUPPLEMENTAL BRIEFING
IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT TO DETERMINE
DISCHARGEABILITY OF POST
PETITION UNJUST ENRICHMENT
CLAIM PURSUANT TO FRCP 12(b)

Jack Carlton Cramer, Jr,

Plaintiff,

v.

21st Mortgage Corporation,

Defendant.

This matter came before the Court on November 5, 2020 on Defendant 21st Mortgage Corporation's ("21st") Motion to Dismiss Plaintiff's Complaint to Determine Dischargeability of Post Petition Unjust Enrichment Claim Pursuant to FRCP 12(b) which had

Page 1 - SECOND SUPPLEMENTAL BRIEFING IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT TO DETERMINE
DISCHARGEABILITY OF POST PETITION UNJUST ENRICHMENT CLAIM
PURSUANT TO FRCP 12(b)

21ST-F74(00543588.000)

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1 been converted to a Motion for Summary Judgment pursuant to FRCP 12(d) ("21st's Motion")
2 and Plaintiff's Cross Motion for Summary Judgment (the "Cross Motion"). At the hearing, the
3 Court permitted the parties to file additional supplemental briefing and declarations to address
4 issues raised by the Court. The deadline to submit the supplemental briefing and declarations
5 was set for November 19, 2020, any responsive briefing is due November 30, 2020, and the
6 Court set a final hearing for December 3, 2020.

7 Pursuant to the Court's statements at the hearing, 21st hereby files a Second
8 Supplemental Briefing and a Supplemental Declaration of Whit Reed ("Supp. Dec.") in support
9 of 21st's Motion to address two, limited issues: (1) the applicability of the return to the fray
10 doctrine, and; (2) the Court's inquiry regarding the state court's records related to the amounts set
11 forth in the Judgment. 21st further relies upon all of the arguments and facts set forth in its prior
12 pleadings, as well as the arguments made at the multiple hearings before the Court.

13 First, as the Court pointed out at the hearing, the case here is analogous to the
14 "return to the fray" cases. When a debtor acts post-petition to voluntarily commence litigation or
15 otherwise voluntarily return to the fray those actions can cause attorneys fees and other charges
16 incurred by a creditor to not be subject to the discharge. *Siegel v. Fed. Home Loan Mortg. Corp.*,
17 143 F.3d 525, 533-34 (9th Cir. 1998). The return to the fray doctrine is an equitable doctrine that
18 holds that where charges have been incurred by continued action by the debtor of pre-petition
19 litigation, those costs will not be discharged when the debtor takes affirmative actions post-
20 petition. *Boeing N. Am., Inc. v. Ybarra (In re Ybarra)*, 424 F.3d 1018, 1026 (9th Cir. 2005). "In
21 other words, while [debtor's] bankruptcy [does] protect him from the results of his past acts,
22 including attorney's fees associated with those acts, it [does] not give him carte blanche to go out
23 and commence new litigation about the contract without consequences." *Siegel*, 143 F.3d at 534.
24 "As for the 'return to the fray' cases, to the extent they fit within the broader 'fair contemplation'
25 test, they stand for the proposition that where a debtor creates a right to recovery through new
26 post-petition conduct, she cannot hide behind the discharge. This is a common sense

¹ proposition." *Umpqua Bank v. Burke (In re Burke)*, No. NC-18-1260-STaB, 2019 Bankr. LEXIS 3653, at *16 (B.A.P. 9th Cir. Nov. 25, 2019)

14 In addition to the foregoing, as to the Court's inquiry regarding funds expended by
15 21st for the payment of the real property taxes, filed contemporaneously herewith is the Supp.
16 Dec. which attaches, as Exhibit 1, the Declaration of Chris Caldwell in Support of Plaintiff's
17 Reply and Motion for Summary Judgment Against Defendants filed in the state court unjust
18 enrichment proceeding. As stated in the Supp. Dec., a review of the state court records shows
19 that, of the \$21,904.58 principal amount of the Judgment, \$17,758.55 was for real property taxes
20 and \$4,146.03 was for insurance premiums.

21 DATED: November 19, 2020.

TOMASI SALYER MARTIN

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Page 3 - SECOND SUPPLEMENTAL BRIEFING IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT TO DETERMINE DISCHARGEABILITY OF POST PETITION UNJUST ENRICHMENT CLAIM PURSUANT TO FRCP 12(b)

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020 I served a copy of the foregoing

3 **SECOND SUPPLEMENTAL BRIEFING IN SUPPORT OF DEFENDANT'S MOTION**
4 **TO DISMISS PLAINTIFF'S COMPLAINT TO DETERMINE DISCHARGEABILITY**
5 **OF POST PETITION UNJUST ENRICHMENT CLAIM PURSUANT TO FRCP 12(b) by**
6 electronic means using ECF to the parties listed below:

Christina L Henry on behalf of Plaintiff Jack Carlton Cramer, Jr
chenry@hdm-legal.com; HenryDeGraaffPS@jubileebk.net;
mainline@hdm-legal.com

Rory C Livesey on behalf of Interested Party Courtesy NEF
rory@liveslaw.com, patti@liveslaw.com

DATED: November 19, 2020.

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